

D.U.P. No. 2008-7

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF TRANSPORTATION),

Respondent,

-and-

Docket No. CI-2007-065

JANE LYONS,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charged filed by an individual charging party against the State of New Jersey (Department of Transportation). The Director found her charge was untimely. And even if timely, the facts do not support a violation of the Act, or are outside of the jurisdiction of the Commission. Accordingly, the charge is dismissed.

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Appearances:

For the Respondent,
Anne Milgram, Attorney General
(Geri Benedetto, Deputy Attorney General)

For the Charging Party,
Jane Lyons, pro se

REFUSAL TO ISSUE COMPLAINT

On May 25 and June 11, 2007, Jane Lyons (Lyons or Charging Party) filed an unfair practice charge and amended charge, against her employer, the State of New Jersey, Department of Transportation (State or DOT). Lyons alleges that the State unfairly reassigned her from her position in the field to the regional field office. Lyons also alleges that her reassignment violated the collective negotiations agreement and amounted to an unlawful disciplinary action. She also alleges that the State has refused to accept some of her grievances about the reassignment and that it has discriminated against her based upon

her gender. The State's actions allegedly violate 5.4a(1), (2), (3), (4), (5), (6) and (7)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A, et seq. (Act).

The State denies violating the Act. It claims that the amended unfair practice charge fails to state a claim upon which relief can be granted because it involves a non-negotiable managerial prerogative -- reassignments. The State also contends that the charge is untimely because the Charging Party's reassignment took place on November 14, 2005 and the amended charge was filed more than one and one-half years later. The State notes that the facts set forth in the amended charge have been litigated in another forum and that her reassignment was held to be proper and non-discriminatory.

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (7) Violating any of the rules and regulations established by the commission."

On January 11, 2008, I wrote a letter to the parties, advising that I was not inclined to issue a complaint in this matter and setting forth the reasons for the tentative decision. On January 21, 2008, Lyons filed a reply, largely reiterating what she had previously written. She asserts that her charge is timely because it concerns a grievance hearing and appeal in 2007; and that each Performance Evaluation System (PES) rating period entitles her a new (i.e., timely) opportunity to assert a violation of the Act. As more fully set forth in this decision, Lyons' grievance hearing and appeal, and her grievances regarding the PES procedures implicate contract provisions and do not concern activity protected by the Act. Also, the filing of a grievance does not toll the statute of limitations. State of NJ (Dept. of Human Services), P.E.R.C. No. 85-48, 10 NJPER 638 (¶15306 1984).

The Commission has authority to issue a complaint where it appears that the charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. The following facts appear.

Jane Lyons is employed as a Senior Engineer, Transportation, with the New Jersey State Department of Transportation and has

been employed by the State for 27 years. She is a member of the collective negotiations unit represented by CWA Local 1032, Professional Unit. Jeffrey Palmer, Regional Construction Engineer, is her immediate supervisor.

The Department of Personnel job specification for her title, Senior Engineer, Transportation, provides in a pertinent part:

Under direction of a Principal Engineer, Transportation, or other supervisor in the (A) Construction Maintenance Service, (B) Design Service, or (C) Traffic and Local Road Design, Department of Transportation, takes the lead in or performs independent work in the complex engineering phases of surveys, studies, designs, investigations, construction, or inspections of transportation systems and appurtenances; does related work as required (emphasis added).

The Department of Personnel rule, N.J.A.C. 4A-7.2,

"Reassignment" provides:

A reassignment is in the in-title movement of an employee to a new job function, shift, location or supervisor within the organizational unit. Reassignments shall be made at the discretion of the head of the organization unit (emphasis added).

N.J.A.C. 4A:4-7.7, Appeals, provides:

Transfers, reassignments or lateral title changes shall not be utilized as part of a disciplinary action, except when disciplinary procedures have been utilized. When an employee challenges the good faith of a transfer, reassignment or lateral title change, the burden of proof shall be on the employee.

On June 1, 2005, Lyons was reassigned from the State's regional office to a field resident engineer position on the Route 73 Median Closure Project. She was informed that the project would take from six months to a year to complete. The State reassigned Lyons as a remedy to a grievance she filed on December 21, 2004.

On October 21, 2005, Palmer issued a counseling memo to Lyons regarding problems with her job performance on the Route 73 project. Ten days later, on October 31, 2005, Lyons, in her capacity as resident engineer on the project, wrote a memorandum to contractor Enrico Paternostro of Green Construction, Inc., providing in a pertinent part:

Many contractors bid for this work and were not given the opportunity to work because you won the bid. Maybe if they had bid with the intent not to follow the specifications, they would be on this project instead of you.

On November 1 and 4, 2005, Palmer issued counseling memos to Lyons specifying her duties on the project and highlighting her conduct causing the State's concern. Palmer also verbally counseled Lyons several times about concerns he had with her official actions on the project.

Also on November 4, Palmer issued a reprimand to Lyons, relieving her of her duties on the Route 73 project. In a pertinent part, he wrote about her October 31 memorandum to contractor Paternostro:

Neither you nor the Department are in possession of any of the contractor's bid preparation documents or any other documentary proof which would support your statement that the contractor's successful low bid was premised on the contractor's intention to save money by not complying with the requirements of the contract. Absent such proof, such a statement of contractor intent is both improper and reckless, and could be used by the contractor as the basis for a claim for damages against both you and the Department . . . Your statement demonstrates your lack of the appropriate judgment needed to serve as a resident engineer.

Effective November 14, 2005, Lyons was reassigned to an administrative senior engineer position in the south region construction office.

On March 21, 2006, Lyons filed a discrimination complaint with the DOT alleging that the State discriminated against her on the basis of race, gender and age, and that she was subjected to a hostile work environment. She also claimed retaliation for her previous complaints and grievances, including a workplace violence complaint she had filed against a contractor. On May 16, 2006, Lyons filed a second discrimination complaint against the DOT, alleging discrimination based upon race and a hostile work environment.

Lyons also filed a contractual grievance, alleging that her removal from the Route 73 Project and reassignment to the regional office was in retaliation for her voicing her beliefs, suggestions and perceptions, and that it also violated the State

Whistleblower Act and other employee rights. Lyons also alleged that since her reassignment was involuntary, the "seniority" and "6 month rule" contract provisions should have been applied to her circumstance and that the reassignment constituted race and sex discrimination.

The State denied the grievance, asserting that the decision to reassign Lyons was work-related and intended for the overall good of the Route 73 project and the DOT's mission.

Local 1032 appealed the denial. On June 26, 2006, a grievance appeal hearing was conducted in which Local 1032 represented Lyons. On July 27, 2006, the assigned hearing officer upheld the denial of Lyons' grievance, finding that the State did not violate Articles 2(A), 2(C), 22(F) and 36(B) of the collective agreement and that its actions complied with the established rules, regulations and procedures of the DOT and Department of Personnel. The hearing officer wrote in a pertinent part:

In this particular case, I find management has presented valid and reasonable arguments to substantiate the move of the Grievant from one job assignment to another.

I find that management has legitimately maintained its rights and has properly exercised its authority and responsibility to make decisions regarding its operations and employees. Mr. Palmer demonstrated reasonable judgment exercised to maintain the good working order of the project and to promote efficiency and effectiveness in the overall operations of the Department.

Lyons filed another grievance alleging that Palmer failed to properly administer the PES used to establish her interim and final ratings. Lyons claimed that her reassignment should have been treated as a disciplinary matter and that the State should have followed contractual disciplinary procedures rather than reassign her. Lyons alleged:

The Department has used the contractor's behavior as a means to discredit my abilities as a Resident Engineer and to try to demonstrate that I am not able to complete all my Senior Engineer Construction duties by taking me out of the field and making me an Office Engineer. This reassignment according to management was due to my reckless, inappropriate behavior. Therefore, they have violated my rights because they did not discipline me but instead reassigned me. Management has used their prerogative and enforced the rules in a way that has taken away my promotional opportunities and have placed me in job duties that are different from my male co-workers without due process.

Local 1032 represented Lyons at a January 16, 2007 hearing on her second grievance. On March 29, 2007, the assigned hearing officer issued a decision, rejecting Lyons' claim that the assignment was disciplinary, and holding in a pertinent part:

To briefly address the discipline argument presented in this case, I find that Management's position in this matter was appropriate and warranted. It was an operational decision that, at that time, and apparently Management's conclusion was that it did not rise to the level of directing discipline toward the Grievant. Further, it must be noted that the Grievant had an avenue of redress through the grievance procedure, which she has certainly often used. At any

rate, Management has the prerogative and discretion to make reasonable decisions regarding its workforce, including how to address the work performance of its employees.

On May 25 and June 11, 2007, Lyons filed the instant unfair practice charge and amended charge. Lyons also filed an appeal with the Department of Personnel Merit System Board. On July 26, 2007, the Board issued a memorandum, declining to review her appeal.

ANALYSIS

Lyons challenges the State's decision to reassign her from the Route 73 Median Closure Project to the field office and contests other reassignments before that date. N.J.S.A. 34:13A-5.4(c) provides:

No complaint shall issue based upon any unfair practice concerning more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 month period shall be computed from the day he was no longer prevented.

Lyons filed her charge and amendment on May 25 and June 11, 2007, respectively. The disputed reassignments by the State, including the most recent one on November 14, 2005, occurred well beyond the six month limitation period set forth in N.J.S.A. 34:13A-5.4(c). Lyons has not alleged any circumstances indicating that she was prevented from filing a timely charge. See Kaczmarek v. N.J. Turnpike Auth., 77 N.J. 329 (1978).

Accordingly, her amended charge is untimely and must be dismissed. See e.g., Certified Shorthand Reporters, et al., D.U.P. No. 97-14, 22 NJPER 336 (¶27175 1996).

Lyons also alleges that her November 14, 2005 reassignment was discriminatory on the basis of gender and violates civil rights laws. These discrimination claims and alleged civil rights violations fall outside of the Commission's jurisdiction. Lyons has appropriately filed those claims at the New Jersey Division on Civil Rights. Accordingly, I dismiss them. See Oakcrest-Absegami Teachers' Assn. (Medica and Butler), D.U.P. No. 97-35, 23 NJPER 261 (¶28125 1997); State of New Jersey, D.U.P. No. 97-15, 22 NJPER 339 (¶27176 1996); Elizabeth Ed. Ass'n (Jefferson), D.U.P. No. 95-33, 21 NJPER 245 (¶26154 1885).

Lyons further alleges that: (1) her November 2005 reassignment constitutes a disciplinary action and should have been handled through contractual disciplinary procedures; (2) her reassignment violated Article 36B of the parties' agreement and (3) the State failed to follow the PES procedures in the parties' agreement. Lyons' allegations implicate contract provisions and are not intertwined with activity protected by the Act. Accordingly, they are dismissed. See State of New Jersey,

(Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).^{2/}

I assume that Lyons alleges that the State, by refusing "to accept" some grievances about her reassignments, has violated 5.4a(5) of the Act. An individual employee normally does not have standing to assert an a(5) violation because the employer's duty to negotiate in good faith runs only to a majority representative. N.J. Turnpike Authority, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd NJPER Supp.2d 101 (¶85 App. Div. 1981); Camden Cty. Highway Dept., D.U.P. No. 84-32, 10 NJPER 399 (¶15185 1984). An individual employee may file an unfair practice charge and independently pursue a claim of an a(5) violation only where that individual has also asserted a viable claim of a breach of the duty of fair representation against the majority representative. Rutgers, the State Univ. & AFSCME Council 52, Local 888 and Jennings, P.E.R.C. No. 88-130, 14 NJPER 414 (¶19166 1988); Jersey City College, D.U.P. No. 97-18, 23 NJPER 1 (¶28001 1996); N.J. Turnpike Authority, D.U.P. No. 80-10, 5 NJPER 18 (¶10268 1979). Lyons does not claim that her majority representative breached the duty of fair representation. Accordingly, I dismiss this allegation. N.J. Turnpike Authority; Jersey City College.

^{2/} No facts suggest that the State violated 5.4a(3) or derivatively a(1) of the Act. These allegations are also dismissed.

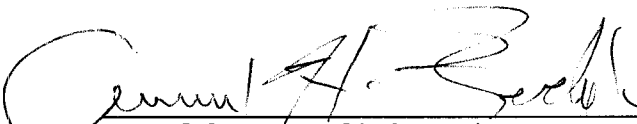
I also dismiss Lyons' a(7) allegation. Lyons raises no allegations or facts to support a finding that this subsection was violated and has not specified which Commission rule or regulation was allegedly violated. Burlington Tp. Bd. of Ed., D.U.P. No. 97-31, 23 NJPER 152 (¶28073 1997). Finally, Lyons asserts no facts supporting her 5.4a(2), (4) and (6) allegations; they also are dismissed.

The Commission's complaint issuance standard has not been met and therefore, no complaint will issue on the allegations of this amended charge.^{3/}

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Arnold H. Zudick, Director

DATED: June 19, 2008
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by June 30, 2008.

^{3/} N.J.A.C. 19:14-2.3.